

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
L. CHARLES KELLER *
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
RONALD G. LONDON *
* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI
L. L. P.
ATTORNEYS AT LAW
1776 K STREET, NORTHWEST, SUITE 200
WASHINGTON, D. C. 20006
(202) 296-0600

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEPCOR@COMMLAW.COM

November 20, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

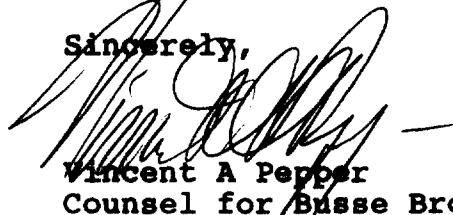
Re: Busse Broadcasting Corporation
Comments in MM Docket 87-268

Dear Mr. Caton:

Transmitted herewith are an original and nine (9) copies of the Comments of Busse Broadcasting Corporation in MM Docket 87-268.

If there are any questions regarding this matter, please contact this office directly.

Sincerely,


Vincent A. Pepper
Counsel for Busse Broadcasting Corp.

Enclosures

No. of Copies rec'd
List ABCDE

0+9

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

RECEIVED

NOV 20 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)

Advanced Television Systems)
and Their Impact Upon the)

Existing Television Broadcast Service)

MM Docket 87-268

COMMENTS OF BUSSE BROADCASTING CORPORATION

Busse Broadcasting Corporation ("Busse"), licensee of television stations KOLN-TV, Lincoln, Nebraska; its satellite, KGIN-TV, Grand Island, Nebraska; and WEAU-TV, Eau Claire, Wisconsin, hereby submits its Comments in response to the *Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry* ("Notice") (FCC 95-315, released August 9, 1995) in the above-captioned proceeding.

I. UPFRONT AUCTION OF SPECTRUM WOULD BE DESTRUCTIVE

1. Busse, along with most broadcasters, supports the Commission's initiatives to bring advanced television systems ("ATV") to the American viewing public as rapidly as possible. This exciting new technology not only represents an important new service for consumers, but it is essential to the survival of the system of free over-the-air broadcasting that has always been the cornerstone of broadcasting in this country. Television broadcasters today are limited to a single channel, but face competition from other video delivery systems that are able to offer multiple channels of programming without the regulatory constraints and public interest obligations imposed on broadcasting. ATV will enable broadcasters to compete more effectively in the changing video marketplace. In order to compete in this new environment, broadcasters must have the ability to offer consumers multiple channels of entertainment and information as their competitors in cable, MMDS, DBS, video dialtone and other technologies can or will be able to offer.

2. The *Notice* at ¶23 asks whether broadcasters should be permitted to use the new ATV spectrum for other than the traditional services. Clearly, the core service must be at least one free over-the-air television channel enhanced by the new digital technology. The Commission should not impose further rigid regulatory constraints on the use of the technology. Rather, it should let marketplace forces dictate whether the remaining spectrum should be used for additional free television services, subscription services, data transmission or some other use not even envisioned today.

3. The *Notice* is replete with instances in which the Commission notes that circumstances have changed since this proceeding began in 1987 and even in the three years since its *Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making* in MM Docket No. 87-268 (*"Third Report/Further Notice"*), 7 FCC Rcd 6924 (1992). See *Notice* at ¶¶39-43, 50-54, 78. The Commission is to be applauded for its willingness to adapt to the rapid pace of technological change and adjust its regulation accordingly. There will, no doubt, be further advances in technology, which militate against a rigid regulatory scheme that will be unable to adjust to changed circumstances. Common sense and experience to date would, therefore, dictate that the Commission adopt a regulatory regime for ATV that would permit maximum flexibility for broadcasters to react to changed circumstances and shifting demands from consumers so that the benefits of the new technology could be brought to the American public as rapidly as possible.

4. What would surely inhibit this goal would be the adoption of any of the various proposals for an upfront auction of this spectrum. While the idea of an auction of frequency is appealing, in light of the recent success the Commission has had with the auction of non-broadcast spectrum, the auction of broadcast spectrum raises entirely different public policy issues. The Commission has, to date, auctioned spectrum for IVDS

and PCS, which are new technologies and next month will auction spectrum for SMR, an existing technology. The critical difference between these services and broadcasting is that the former have no public interest obligations and few of the other regulatory constraints imposed on broadcasting. For this reason, Congress wisely prohibited the auction of broadcast spectrum when it enacted Section 309(j) of the Communications Act of 1934.

5. The Congress is determined to balance the federal budget by 2002. But, the budget should not be balanced on the backs of broadcasters who already pay regulatory fees to the Commission in addition to federal income tax. A spectrum auction would be another tax on broadcasting, the only medium of mass communications available to consumers at no direct cost. Spectrum auctions would drive out established broadcasters with long and distinguished records of service to their communities. Smaller broadcasters, such as Busse, would be unable to bid successfully for the ability to continue to serve their own markets. They would be replaced by speculators with no long-term commitment to serving their communities or large conglomerates who would further decrease diversity of ownership, a long-standing goal of the Commission. Broadcasting would begin to look like cable where an ever-dwindling number of entities control an ever-growing share of the market. According to the most recent available figures, the top five multi-system operators control 49.57 percent of the cable market. *TV Digest*, May 8, 1995.

6. Although the revenue from spectrum auctions would be of use to Congress as it strives to balance the federal government, the hidden costs of spectrum auctions have not been analyzed. An existing broadcaster or a newcomer would have to amortize the cost of the spectrum. Where would the money come from? Stations would have two alternatives, neither of which are palatable: (1) reduce expenditures for programming, including news

and public affairs; or, (2) increase advertising rates, which, if advertisers would be willing to pay the higher rates, increase the cost of goods and services to consumers.

7. The easy argument in favor of spectrum auctions is that it forces broadcasters to pay for valuable public property that has been available to them at no cost. The fact of the matter is that, even today, spectrum is not free. Broadcasters pay a variety of regulatory fees that amount to a spectrum tax. The public interest obligations and EEO requirements imposed only on broadcasters are not without significant cost. Moreover, as will be addressed below, broadcasters will also be required to bear the substantial costs of the transition to ATV. Busse, along with most broadcasters, is ready, willing and able to bear the cost of bringing this new technology to consumers on a reasonable timetable dictated by market demand. To require the broadcast industry to pay for spectrum on top of bearing the costs of bringing ATV technology to the public is unreasonable and disserves the public interest.

II. THE MARKETPLACE SHOULD DICTATE THE PACE OF TRANSITION

1. The critical issue for all broadcasters, in the largest and the smallest markets, network affiliates or independents, is the pace of transition from the present analog NTSC standard to the new digital ATV standard. The Commission initially imposed a 15-year transition period. *Third Report/Further Notice, supra* at 6964. Now, citing “changed circumstances,” the Commission proposes a more flexible approach and seeks comment as to whether “some objective benchmark(s) should be used to determine when broadcasters should cease NTSC transmission.” *Notice* at ¶153.

2. The imposition of an arbitrary date certain by which NTSC transmission would end is, Busse suggests, neither wise nor in the public interest. We have no way of knowing at this juncture how long it will take for the marketplace to accept ATV technology.

Indeed, the marketplace may react to ATV in the same way it failed to embrace laser discs, quadraphonic sound and any number of other failed technologies. Who is to say that ATV, despite the rosy predictions, will not meet the same fate as the Edsel and New Coke? Nor can anyone say with certainty that some now unknown technology will not prove superior to ATV much as CDs replaced cassettes, which replaced LPs, which replaced 78s. The predictions of the best and brightest minds are no substitute for the ultimate test bed -- the marketplace.

3. The transition to ATV is unique in the annals of broadcasting. The transition from monaural FM to FM stereo and from black and white television to color were easy because consumers could purchase the new equipment at their own pace. The Commission set the standard for FM stereo and color television (rejecting a non-compatible system) and then stepped back to allow the marketplace to determine the pace of conversion. The parallels are striking. Conversion to FM stereo and color television required broadcasters to purchase new production and transmission equipment, as will be required with ATV. Similarly, consumers needed to purchase new receivers. But in neither case were licensees under any mandate other than the demands of the marketplace to accomplish the transition. Study of the history of the transition to FM stereo and color television reveals that, initially, only a few pioneering stations converted. High prices kept consumers from purchasing the receivers. But, as the prices dropped, the demand for more programming increased and the pace of transition quickened until, ultimately, the conversion was effected. But, only at the pace the marketplace had set, not in response to some arbitrary regulatory mandate.

4. According to the National Association of Broadcasters ("NAB"), consumers are slow to adapt to new technology, no matter how exciting it may appear. Ten years after their introduction, VCRs had only 43 percent market penetration and CDs had only 35

percent penetration. These technologies require only modest expenditures by consumers. Color television, which is a more relevant analogy, had achieved only 20 percent penetration 10 years after its introduction.

5. Market penetration, as measured by a reliable independent research firm, should be the Commission's benchmark to determine when the NTSC era should end. NTSC transmissions should not be required to cease until the vast majority of television households are equipped to receive ATV transmissions. Viewers should not be disenfranchised because some arbitrary benchmark or timetable dictates that their television set is obsolete. In their separate statements accompanying the *Notice*, each of the Commissioners stressed the importance of retaining our systems of free over-the-air television. Commissioner Chong stated that the Commission should not "disenfranchise those Americans who rely on their analog TV sets for over-the-air broadcast service. *Separate Statement of Commissioner Rachelle Chong* at p. 3.

6. The *Notice* at ¶64 proposes that licensees make an "election and confirm to the Commission that they want an ATV license" during a six-month period beginning with the selection of an ATV system or an ATV Allotment Table. The "election" is not a viable choice in that those licensees who do not elect that they want an ATV license have, in effect, elected to go out of business since, under the Commission's proposal, those licensees who do not have ATV facilities at the end of the transition period will be required to turn in their NTSC licenses.

7. The costs of ATV conversion for both consumers and broadcasters will be frighteningly high. Zenith estimates the cost of ATV receivers at \$2,500. Even a converter box for existing receivers will initially cost as much as \$500. Prices will likely fall over time,

but the evidence suggests that even if consumers embrace ATV, it will be many years before they adopt the new technology in any great numbers.

8. Consumers will at least have a choice as to whether to convert to ATV. Broadcasters will, on the other hand, have no option. The Commission's proposal mandates that they spend \$8-10 million to convert or turn in their licenses . Providing spectrum to broadcasters is not the "giveaway" that proponents of auctions and spectrum fees claim. They argue that broadcasters should pay for spectrum in the same manner that firms using federal lands for grazing cattle, mining and logging pay for the use of public property. But the analogy is not apt. These users of federal land are not required to invest millions of dollars in special equipment uniquely suited to the use of this public property. Nor are they pioneering a new and unproven technology as broadcasters utilizing ATV will be doing . There is an established ready market for the products that will result from such use of federal lands. ATV is a gamble that may or may not pay off. If it does, it will be due, in large part, to the skill of broadcast entrepreneurs in exploiting ATV for public benefit. The spectrum has no value until it is exploited. Finally, broadcast spectrum, unlike grass, trees or minerals, is an instantly renewable resource Moreover, at the end of the transition period, broadcasters will return their existing NTSC spectrum to the federal government. Therefore, the argument that broadcasters are getting a free ride on public spectrum just does not hold up.

9. At ¶65 of the *Notice*, the Commission asks for comment on the "practical difficulties licensees will have in successfully undertaking the conversion" to ATV. The question should have, more properly, been phrased to seek comment on the economic difficulties licensees will face. While there may be some practical difficulties in obtaining new tower sites and timely delivery of ATV production and transmission equipment, the

core issue for broadcasters is how they will pay for the conversion. Mere pass-through capability, with no local origination, will cost each station up to \$1.5 million, according to NAB estimates. Full conversion to local origination of digital programming will cost an additional \$7-9 million. Additionally, broadcasters will have to bear the added costs of operating NTSC and ATV facilities during the transition period. NAB estimates conversion to ATV will cost stations an average of \$400,000 per year. For many stations that sum represents a significant percent of their profit. Normal business considerations would dictate that an expenditure of this type would not be made unless a reasonable return on investment could be predicted. The Commission, therefore, should not adopt a conversion scheme that forces broadcasters to make business decisions that would not ordinarily withstand critical cost-benefit analysis.

III. SMALLER STATIONS NEED SPECIAL CONSIDERATION

1. At ¶67 the *Notice* solicits comment on whether there should be a different transition scheme for small market stations and stations in economically disadvantaged areas. The *Notice* asks the right question in the wrong way. The issue is not limited to stations in small markets or disadvantaged areas. There may be stations in large markets, such as religious or other specialty formats, that will not be able to make the transition as rapidly as their competitors.

2. Busse's stations are located in the 101st (Lincoln & Hastings-Kearney) and 135th (LaCrosse-Eau Claire) DMAs. Warren Publishing, *Television & Cable Factbook*, 1995 ed. Busse's cost of purchasing a new digital transmitter, studio camera or switcher in Lincoln or Eau Claire will be the same as stations in New York or Los Angeles will pay. Busse's costs may actually be higher since networks buying digital equipment for their production

facilities and owned and operated stations will be able to obtain more favorable deals from equipment suppliers.

3. The economic tilt against smaller stations militates against any rigid timetable for conversion to ATV and in favor of allowing the market to dictate the pace. For such stations, a \$400,000 annual expenditure for conversion to ATV may exceed its total cash flow. Assuming a multiple of 10 times cash flow, the \$10 million estimated cost for total conversion would exceed the value of any station -- and there are many -- with a cash flow of less than \$1 million. To force stations to make such expenditures is neither good business nor good public policy. For some stations, it will actually be impossible.

4. Nor is the proposal advanced at ¶69 of the *Notice* to extend the deadline for a licensee that has not built after the six-year transition period if no one else applies for the ATV license. This will only invite speculators and further delay in ATV conversion. There is no guarantee that a new entrant will construct ATV facilities any sooner than the incumbent licensee.

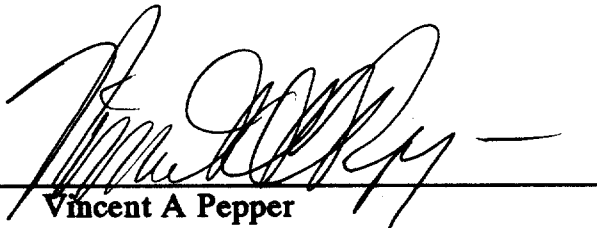
5. ATV is an exciting new technology that promises enormous benefits for consumers. But, the Commission, as it sets policy for conversion, must bear in mind the fact that this is technology yet to be tested in the crucible of the marketplace. The proper role for the Commission, Busse suggests, is to set the standards for ATV transmission as it did with FM stereo and color television, and then, as it also did with FM stereo and color television, allow the marketplace to dictate the speed of conversion. The Commission should not establish a regulatory scheme that will force prudent broadcasters to make imprudent expenditures.

6. The present proposals for arbitrary and inflexible timetables coupled with auctions for spectrum will destroy the present system of free over-the-air television. Only the largest

operators will survive. Small groups in small markets, such as Busse, will not endure. The Notice at ¶¶11 and 22 as well as the separate statements of each of the Commissioners notes the importance of free over-the-air broadcasting to our democracy. A well-reasoned transition to ATV taking into account the economic and marketplace realities will ensure the continued vitality of free over-the-air broadcasting.

Respectfully Submitted,

BUSSE BROADCASTING CORPORATION

By  _____
Vincent A Pepper

Its Attorney

PEPPER & CORAZZINI, L.L.P.
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(202) 296-0600

November 20, 1995

CERTIFICATE OF SERVICE

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, do hereby certify that copies of the foregoing "Comments of Busse Broadcsating Corporation" were served by hand delivery on November 20, 1995 on the following individuals:

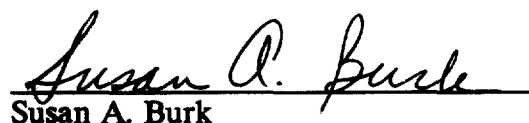
Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., ROOM 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., ROOM 802
Washington, DC 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., ROOM 826
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., ROOM 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., ROOM 832
Washington, DC 20554


Susan A. Burk